

EXHIBIT 4

Picard v Merkin

Jeffrey Weingarten 7/15/2015

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC, Adv. Pro. No.
08-01789 (BRL)

Debtor.

-----x

IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,Plaintiff, Adv. Pro. No.
09-1182 (BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.

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VIDEOTAPED DEPOSITION
OF JEFFREY M. WEINGARTEN

* * *

TRANSCRIPT of testimony as reported
by NANCY C. BENDISH, Certified Court Reporter,
RMR, CRR and Notary Public of the State of
New York, at the offices of Baker Hostetler,
45 Rockefeller Plaza, New York, New York, on
Wednesday, July 15, 2015, commencing at 10:10 a.m.

1 THE WITNESS: I'm sorry, sorry,
2 sorry.

3 Q. Did you review more transcripts
4 than that are set forth on the documents
5 considered list in the preparation of your
6 report in this matter?

7 A. Not that I remember, no.

8 Q. Are you aware of the number of
9 depositions that have been taken in this matter?

10 A. No, I am not.

11 Q. Other than the transcripts that
12 are set forth on this list, were other
13 transcripts made available to you?

14 MR. STEINER: Objection to form.

15 A. Was there a supplemental list?

16 When was this list submitted with documents?

17 Q. This was the list that was
18 appended to your expert report dated March 19,
19 2015.

20 A. I don't remember if I read any
21 transcripts subsequent to this. I think I read
22 the transcript of the deposition of
23 Mr. Pomerantz.

24 Q. Okay. But that was subsequent to
25 the issuance of this report; is that correct?

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1 A. That's okay, I can manage.

2 Q. Take a look at the bottom of page
3 3 of your report. It says, where it's the last
4 full paragraph, it says, "It is also clear that
5 the philosophy would forego potential higher
6 profit opportunities in order to avoid risk of
7 loss. For example, being out of the market
8 around highly volatile periods during which
9 options expire would be part of the philosophy."

10 Did you do an analysis to
11 determine if -- strike that.

12 Do you have an understanding of
13 when Mr. Madoff was out of the market?

14 A. I have an understanding that there
15 were times when he was out of the markets, yes.

16 Q. And do you have an understanding
17 of what those times were?

18 A. Well, they were generally at the
19 end of -- I believe it was the end of quarters
20 or the end of the year, for sure.

21 Q. And were those -- did you do any
22 analysis to determine if those were highly
23 volatile periods of time when he was out of the
24 market?

25 A. I didn't do an analysis

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1 specifically, but having been a fund manager
2 myself for many years, I know that there are
3 certain times during the year, and very
4 definitely at the end of the year, when, for a
5 combination of reasons markets and individual
6 securities are unusually volatile.

7 Q. But you didn't do an analysis on
8 the transactions that were occurring in
9 Mr. Madoff -- in the Madoff fund BLMIS accounts,
10 did you?

11 A. No. It was sufficient for me to
12 understand that there were times when the
13 markets were volatile. And that I would
14 understand why someone would choose not to be in
15 markets at those particular times to avoid that
16 particular volatility.

17 Q. Did you make a determination if
18 the market was particularly volatile at the end
19 of each quarter?

20 A. Again, my experience as a fund
21 manager is that there were times when markets,
22 and particularly individual stocks, were
23 particularly volatile at the end of each
24 quarter, largely because many funds would engage
25 in what was typically called window dressing.

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1 So fund managers across the world,
2 and I would say possibly particularly hedge fund
3 managers, would want their portfolios to look
4 particularly good at the end of a quarter.

5 Q. But you didn't verify if, in fact,
6 in the Merkin fund BLMIS accounts that the
7 market was volatile at the end of each quarter,
8 did you?

9 A. I did not determine on a quarter
10 by quarter the volatility of the market. As I
11 said, I'm aware of having been in the markets at
12 those times over an almost 20-year period that
13 the markets typically were unusually, or had the
14 potential to be unusually volatile at the end of
15 any quarter, and certainly at the end of the
16 year.

17 Q. When you say in that sentence,
18 where you say, "being out of the market around
19 highly volatile periods during which options
20 expire --"

21 A. Among other things.

22 Q. "-- would be part of the
23 philosophy." Just let me -- I haven't asked you
24 a question yet. Just take a look at that.

25 Do you mean that during those

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1 highly volatile periods that the options
2 contracts would also expire?

3 A. No. What I meant was, at the end
4 of the quarter markets had the potential to be
5 very volatile and at the end of options
6 expiration dates also the markets had the
7 potential to be particularly volatile.

8 Q. Did you make a determination if
9 the option -- strike that.

10 Did you make a determination in
11 the Merkin fund BLMIS accounts if the options
12 expired at the end of each quarter?

13 MR. STEINER: Objection to form.

14 A. I did not go through each option
15 expiration -- each option to find out when it
16 expired, no.

17 Q. Do you see the next line there,
18 you say, this is a strategy in which many market
19 practitioners adhere to? Do you see that there?

20 A. Show me the paragraph.

21 Q. Same paragraph, the following
22 sentence.

23 A. I'm sorry, I think I lost the
24 page.

25 Q. It's the exact same sentence we

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1 how Mr. Merkin was able to predict the market
2 movement?

3 A. I don't know how he was able to
4 predict the market movement, but it was pretty
5 clear to me that over the period, at least one
6 or two of the periods that I looked at, that he
7 was able to take advantage of a market movement
8 that was unusual and was not sustainable for the
9 entire year. And that's why I was able to make
10 the statement that had he been engaging in a
11 split-strike conversion strategy and implement
12 it at the beginning of the year and took it off
13 at the end of the year, his returns might not
14 have been as good as the returns he generated,
15 or allegedly generated, because he was able to
16 take advantage of intra-year market movement
17 that enhanced his returns.

18 Q. And did you find this to be true
19 for the handful of transactions that you looked
20 at?

21 A. Yes.

22 Q. And when you say you looked at
23 transactions, are you looking -- is it more than
24 ten transactions?

25 A. No. I actually only looked at a

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1 few -- a couple of transactions that I remember.
2 I mean, I didn't go through many of them, but I
3 looked at a couple and was able to see exactly
4 how he was able to do -- how he was able to
5 generate returns. For example, how he was able
6 to generate positive returns in down markets.

7 Q. Okay. When you say a couple of
8 transactions, are you saying two or three
9 transactions?

10 A. Yes.

11 Q. And for what time period were
12 those transactions?

13 A. Again, it was a while ago, so I
14 don't remember exactly. I think one was in
15 mid-2000s, 2004, something like that, and one
16 was in 2007. Those are the only two that I
17 remember off the top of my head.

18 Q. So other than those two and
19 possibly a third, you didn't look at any other
20 transactions in the Merkin fund BLMIS accounts?

21 A. I don't remember looking at any
22 others but, again, I looked at those two and I
23 got a pretty good idea of how the timing of the
24 investments would generate significant benefits
25 over a buy/hold split-strike conversion

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1 strategy. Because what I was trying to
2 determine was how Madoff was able to generate
3 the returns that other people who looked at it
4 were not able to replicate.

5 Q. Did you, in the few transactions
6 that you took a look at, did you actually test
7 to determine if market timing was a factor in
8 those transactions?

9 A. I looked at what he bought things
10 for, what he sold things for, subtracted the
11 difference and realized that he made money.

12 Q. And is that it? That's all you
13 did?

14 A. Well, that was the starting point.
15 He made money in the period of time when the
16 market was down.

17 I then looked at the underlying
18 securities and tried to figure out how that
19 could possibly have occurred. And I determined
20 how that could possibly have occurred.

21 Q. And you determined it was due to
22 market timing?

23 A. I determined that he was able to
24 take advantage of movements within the market
25 that were not immediately obvious to a lot of

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1 A. Could you repeat that question.

2 Q. Did you confirm or do any analysis
3 to confirm that execution -- strike that.

4 Did you do any analysis to confirm
5 that the returns in the Merkin fund BLMIS
6 accounts were the result of Madoff's
7 particularly good execution?

8 A. I did not do any myself. As I
9 said, there were enough people who did that
10 analysis or believed that execution was superior
11 and that would have enhanced the returns.

12 Again, over what you might consider
13 straightforward split-strike conversion
14 strategy.

15 Q. And who are you referring to when
16 you say enough people did that analysis?

17 A. Well, for example, Mr. Pomerantz
18 was one of them.

19 Q. And you reviewed Dr. Pomerantz's
20 report? Did you review Dr. Pomerantz's report
21 in preparation of your rebuttal report?

22 A. Yes. And I read his transcript, I
23 think I said, subsequent to my coming here --
24 prior to my coming here, subsequent to my
25 submitting the rebuttal.

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1 certainly what he believed.

2 I could certainly imagine, for
3 example, that in looking how the fund performed
4 in, for example, down markets, how he could have
5 timed things such that he could make money, he
6 would have certainly seen that there were times
7 when the market was down and Madoff did make
8 money, but exactly how he confirmed in his own
9 mind I'm not entirely sure.

10 But as I said, I inferred from the
11 many comments that he made that he actually
12 believed that some combination of vast
13 experience in the market, access to order flow,
14 perhaps a proprietary model, all contributed to
15 his ability to time the market such that he
16 could earn returns above those which a
17 straightforward split-strike conversion strategy
18 would have returned and, indeed when I looked at
19 some of the results I was able to confirm in my
20 own mind how he was able to do that, and that
21 his market timing ability clearly was
22 demonstrable.

23 Q. Can you turn to page, in your
24 rebuttal report, which is the second exhibit,
25 take a look at page 2 of that report.

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1 A. I looked at the underlying
2 instruments in which Madoff was allegedly
3 investing to see what drove the prices of those
4 instruments, and I was able to determine,
5 certainly to my satisfaction, that the
6 underlying movements in the prices of those
7 instruments were timed such that he was --
8 actually, had he engaged in the purchases and
9 sales that he alleged to have done, he would
10 have made money; for example, in down markets.

11 Q. And which instruments are you
12 talking about there?

13 A. The instruments he was using, the
14 underlying pricing of -- I don't remember if at
15 that time he was talking about -- if we were
16 looking at baskets or looking at indices, but
17 the underlying security, the pricing of the puts
18 and then the pricing of the calls.

19 Q. Okay. And what particular time
20 frame are you talking about that you performed
21 this analysis?

22 A. Well, as I said, the couple of
23 periods that I remember looking at I think there
24 were about six-week periods, so they were
25 certainly sufficiently long that the delay in

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1 reporting wouldn't have mattered because they
2 were over six-week periods and certainly he
3 didn't delay six weeks before he sent confirms.

4 So what I'm saying is that had he
5 actually engaged in the transactions that he
6 sent confirmations for, he actually would have
7 made money in a down market.

8 Q. Okay. Referring to your analysis,
9 you said you looked at a six-week period of
10 time; is that correct?

11 A. Um-hum. That was the period of
12 time over which he had the position on.

13 Q. Okay. And which transaction are
14 you referring to when you say you looked at
15 the -- you looked at over a six-week period of
16 time?

17 A. Okay, so there was a six-week
18 period of time in which he engaged in a
19 split-strike conversion strategy as defined, and
20 during that period of time the market was down
21 and the returns were actually positive.

22 Q. What period of time was that?

23 A. This was over a six-week period of
24 time.

25 Q. When?

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1 A. This was sometime I think -- I
2 said I looked at a couple, one was I think
3 2000 -- I have to go back and look at it because
4 I didn't write it down, but one I think was 2007
5 and one I think was 2004.

6 Q. And when you said you looked --
7 what particular documents did you look at to
8 determine the returns during the six-week period
9 of time?

10 A. I think they were statements of
11 Merkin's.

12 Q. Anything else?

13 A. No, but they had the underlying
14 securities, and that's what I wanted to look at.
15 And then I compared -- I looked at what drove
16 the pricing of the various positions. So I
17 determined how much of it was market and how
18 much might have been other things.

19 Q. Okay. How much -- how did you
20 determine if it was market?

21 A. I looked at the opening price of
22 the market when he put on the position and the
23 closing price of the market when he took off the
24 position.

25 Q. And that market information was

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1 from Bloomberg; is that correct?

2 A. It was some market -- some
3 reliable third-party market source. I don't
4 remember whether it was Bloomberg or something
5 else.

6 Q. Are you aware that Mr. Merkin had
7 a Bloomberg -- I'm sorry. Are you aware that
8 GCC had a Bloomberg terminal in its offices?

9 A. No.

10 Q. When you say in that same sentence
11 we were just talking about, most investors,
12 including Mr. Merkin were aware, the same page,
13 bottom of page 2 where we were talking about.
14 Do you see the second sentence, "most
15 investors"? The same sentence that we were just
16 looking at.

17 A. Yeah.

18 Q. Do you see?

19 A. Yeah.

20 Q. Who are you referring to when you
21 say "most investors"?

22 A. Well, I looked at some of the
23 materials at various times over other people who
24 were investing, and I think -- and again reading
25 some of the documents that I included in here

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1 A. It's what I looked at, yes.

2 Q. And do you know for a fact if

3 Mr. Merkin was also -- went through a process

4 similar to what you just explained?

5 A. I don't know what Mr. Merkin might
6 have done but I, again, as I said, in various
7 things that I had read, Mr. Merkin believed that
8 through some combination of experience in the
9 markets, access to order flow, that he was able
10 to time the pricing of securities in a way that
11 would allow him to generate returns.

12 Q. But you don't know if Mr. Merkin
13 actually did an analysis of order flow to
14 determine if the returns in the Madoff fund
15 BLMIS accounts were the result of order flow; is
16 that correct?

17 MR. STEINER: Objection to form.

18 MS. HOANG: I'm sorry, let me
19 rephrase it.

20 Q. Do you know for a fact if
21 Mr. Merkin actually did an analysis to determine
22 if the returns in the Madoff BLMIS account was
23 the result of order flow?

24 MR. STEINER: Objection to form.

25 A. I don't know if he did, but I

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1 don't know how you could possibly determine
2 that.

3 So, I think what I said was that
4 in various things that I have read, I inferred
5 that Mr. Merkin knew that Mr. Madoff had, by
6 virtue of his long experience in the markets and
7 potentially by virtue of his access to order
8 flow, that he was capable of using that to time
9 the markets in order to produce the returns that
10 he was producing.

11 Q. Do you know if Mr. Merkin actually
12 verified that the access to order flow could
13 generate the returns that were in the Madoff
14 fund accounts?

15 A. I'm sorry, that's not what I said.
16 What I said was that I believed that -- I
17 inferred from what Mr. Merkin said that he knew
18 that some combination of market experience and
19 knowledge and access to order flow could, and
20 indeed would be used to help him time the
21 markets and producing superior returns. That's
22 as much as I know.

23 Q. And you're inferring that based on
24 the documents that --

25 A. Based on a whole array of things

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1 that he said or wrote or commented on, yeah.

2 Q. When we were talking about the
3 market timing, I asked you if you would consider
4 it successful to be in the market four out of
5 seven times when the market was up, and you
6 indicated that you would need additional
7 information. Do you recall that?

8 A. Yes. I would need to know what
9 else was going on at the time because, as I
10 said, it was illustrative for me to look at some
11 of the data and understand how Mr. Madoff was
12 able to generate positive returns in a down
13 market.

14 So, if I were addressing your
15 question, would being in the market four out of
16 seven times when the market was up indicate an
17 ability to time the markets, it wouldn't include
18 the occasion when he substantially out-performed
19 and, indeed, generated positive returns in a
20 down market, which to me demonstrated his
21 ability to time the markets in a particular way
22 to generate a positive return.

23 Q. Okay, I just want to clarify. Is
24 it the frequency of being in and out of the
25 market or is it the actual generating positive

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1 Q. Do you know for a fact whether
2 Mr. Merkin also had this same understanding?

3 A. I don't know what Mr. Merkin's
4 understanding was, other than what I said
5 before, that I inferred that he believed that
6 amongst Mr. Madoff's abilities and amongst the
7 tools that Mr. Madoff could use to generate
8 superior returns, were his ability, by virtue of
9 his experience and perhaps access to order flow,
10 to time the markets and accurately predict price
11 movements in the instruments to generate those
12 returns.

13 Q. Mr. Weingarten, can you take a
14 look at page 4 of your report, your initial
15 report. It's paragraph 4 of that report.

16 A. Page --

17 Q. Page 4, paragraph 4.

18 A. Beginning with?

19 Q. Let me double check that
20 reference. Hold on one second.

21 It's the fourth full paragraph,
22 it's the last sentence.

23 A. "It was clear from the outset that
24 Mr. Merkin --"

25 Q. Yes. If you look at, "In my

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1 the money sometime and I managed it for three or
2 four years.

3 Q. Mr. Weingarten, you mentioned that
4 you're aware that Mr. Merkin took some investors
5 to meet with Mr. Madoff. Do you recall that?

6 A. I'm sorry, would you say that
7 again.

8 Q. Do you recall that you mentioned
9 that you were aware that Mr. Merkin took some
10 investors to meet with Mr. Madoff? Do you
11 recall that?

12 A. Yes.

13 Q. If a particular investor had
14 voiced concerns to Mr. Merkin about investing
15 with BLMIS or Mr. Madoff, what would you -- what
16 would you expect Mr. Merkin to do with that
17 information, or that concern?

18 A. I guess it would depend on what
19 the concern was and -- I guess it would depend
20 on what the concern was. So, again, I can speak
21 from my own experience. There were a lot of
22 people with whom I discussed my investment
23 philosophy and process and procedures. And
24 there were people who thought that in my case I
25 had a very focused approach to investing. I

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1 Madoff was able to generate positive returns in
2 a down market. And why, if those circumstances
3 were repeated, he would always generate positive
4 returns in down markets.

5 Q. And that's based on looking at
6 those two or three transactions that you
7 referred to before in 2004, 2007; is that
8 correct?

9 A. Looking at those transactions,
10 understanding why the underlying pricing of some
11 of the instruments in which he invested could
12 generate the kinds of returns he did, and
13 understanding that, as I said, under similar
14 conditions he would almost always, if not
15 always, generate positive returns in down
16 markets, yes.

17 Q. And do you have an understanding
18 if Mr. Merkin performed the type of analysis
19 that you've just described in order to determine
20 the positive returns in a down market?

21 A. As I said before, I'm not sure
22 what analysis Mr. Merkin did. I infer from
23 everything that Mr. Merkin -- not everything. I
24 infer from the things that Mr. Merkin has said,
25 that he understood that through some combination

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1 of experience, access to order flow, that Merkin
2 was able -- sorry. That Madoff was able to use
3 a variety of tools to time markets and price
4 instruments in a way that would permit him to do
5 substantially better than the market over a
6 period of time.

7 And that presumably, and again
8 this is not -- I would infer that since he was
9 looking at the performance on a fairly regular
10 basis, he would have been aware that there were
11 occasions in which Madoff allegedly made money
12 in down markets.

13 Q. Can you turn to page 5 of your
14 initial report. You see that second full
15 paragraph, the first two sentences -- first
16 three.

17 A. I'm sorry, the first full
18 paragraph?

19 Q. The second full paragraph.

20 A. Second full paragraph.

21 Q. Apologize for that. Starts,
22 "Another, but absolutely critical, part." Do
23 you see that?

24 A. Yes.

25 Q. If you could take a look at --

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1 based.

2 Q. Do you know if Mr. Madoff received
3 any other compensation from the Merkin funds?

4 Other than the commission.

5 A. I'm not aware of any.

6 Q. And in your experience, what is a
7 typical fee arrangement for an investment
8 advisor?

9 A. Well, I didn't actually think of
10 Madoff as being an investment advisor. I
11 thought of him as having a typical brokerage
12 relationship with clients. And my experience of
13 that, particularly at the time we're talking
14 here, is that most relationships that
15 broker-dealers had with their clients were
16 commission based.

17 So, what Madoff was doing was
18 entirely consistent with my experience of
19 broker-dealer based relationships with their
20 clients.

21 Q. Do you have an understanding of
22 whether the Madoff funds' BLMIS accounts were
23 discretionary, non-discretionary accounts?

24 A. That's a good question. I'm not
25 sure. I just assumed that they were

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Picard v. J. Ezra Merkin, et al., No. 09-1182 (SMB)
Errata to the Transcript of the Deposition of Jeffrey M. Weingarten
July 15, 2015

Cite	Original Text	Change	Reason
20:12	broker-dealer and asset management	broker-dealer and asset manager	Clarity/Typo
28:4-5	Goldman Sachs asset management international	Goldman Sachs Asset Management International	Typo
30:21	swarth	swath	Typo
31:3	an investment opportunities	an investment opportunity	Typo
50:4	at all time	at all times	Typo
77:3-4	I think there are three other people directly report to him.	I think there are three other people who directly report to him.	Clarity/Typo
111:14	GSAMs, Golden Sachs asset management	GSAM, Goldman Sachs Asset Management	Typo
113:23-24	A. Um-hum. It's the second from the last paragraph, "It is very clear."	A. Um-hum. Q. It's the second from the last paragraph, "It is very clear."	Clarity/Typo
115:16-17	other people who investment philosophy	other people whose investment philosophy	Clarity/Typo
118:23-24	understanding of what it was his investment philosophy was	understanding of what his investment philosophy was	Clarity/Typo
134:9-10	there would be different return profile	there would be a different return profile	Clarity/Typo
147:9	times that options expiration.	times that options expire.	Clarity/Typo
173:3	would not have produced the kind of results.	would not have produced those kind of results.	Clarity/Typo
189:9-10	when Mr. Merkin was investing with Mr. Madoff was still receiving	when Mr. Merkin was investing with Mr. Madoff, I was still receiving	Clarity/Typo
193:11	from most of my tenure	for most of my tenure	Typo
219:7	offered me \$400 billion	offered me \$400 million	Clarity/Typo
231:6-7	you would experience massive redemptions.	you would not experience massive redemptions.	Clarity/Typo

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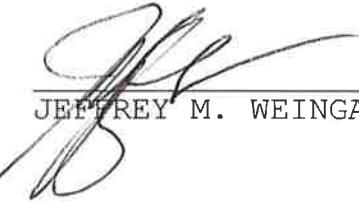
1

JURAT

2

I, JEFFREY M. WEINGARTEN, have
3 read the foregoing deposition and hereby affix
4 my signature that same is true and correct,
5 except as noted above.

6


JEFFREY M. WEINGARTEN

7

THE STATE OF New York

8

COUNTY OF New York

9

10 Before me, Connie Liu, on this
11 day personally appeared Jeffrey M. Weingarten,
12 known to me (or proved to me on the oath of or
13 through passport (description of identity
14 card or other document) to be the person whose
15 name is subscribed to the foregoing instrument
16 and acknowledged to me that he/she executed the
17 same for the purpose and consideration therein
18 expressed.

19

Given under my hand and seal of office on
20 this 13th day of August, 2015.

21

CONNIE LIU

22

NOTARY PUBLIC-STATE OF NEW YORK

23

No. 01LI6285845

24

Qualified In Kings County

25

My Commission Expires July 15, 2017


NOTARY PUBLIC IN AND FOR
THE STATE OF NY

26

27

My Commission Expires: July 15, 2017.

BENDISH REPORTING

877.404.2193